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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ AND LEONARD B. BOUDIN, PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-9a) is reported at 318 F.2d 181.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1963 (Pet. 10a), and a timely petition

for rehearing was denied on May 1, 1963 (R. 47).[1] The petition for a writ of certiorari was filed on July 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an action against the Attorney General for a declaratory judgment that petitioners, a firm of lawyers representing the Cuban government, are not subject to the registration requirements of the Foreign Agents Registration Act, was properly dismissed as an unconsented suit against the United States.

2. Whether the dismissal may be upheld on the alternative ground that it constitutes an impermissible attempt to enjoin a criminal prosecution.

STATUTES INVOLVED

The pertinent provisions of the Foreign Agents Registration Act, 52 Stat. 631, as amended, 22 U.S.C. 611 *et seq.*, as amended, and the Declaratory Judgment Act, 62 Stat. 964, as amended, 28 U.S.C. 2201, appear in the petition at pages 2-4.

STATEMENT

Petitioners, a firm of lawyers, instituted this action in the United States District Court for the District of Columbia against the Attorney General for a declaratory judgment that their "activities as legal

[1] "R." refers to the joint appendix in the court of appeals, which has been filed with this Court.

representatives for the Republic of Cuba" do not require them to register under the Foreign Agents Registration Act (R. 7). Section 2 of that Act (22 U.S.C. 612) prohibits any person from acting as agent of any foreign government or foreign political party, unless he has registered with the Attorney General; Section 3(d) (22 U.S.C. 613(d)) provides an exception from the registration requirements for any person engaged "only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal * * * "; and Section 8 (22 U.S.C. 618) provides criminal penalties for willful violations.

Petitioners' complaint (R. 4-7) alleged that in September 1960 the Cuban Government retained them to represent it and its agencies in legal matters, including litigation, involving that Government's mercantile and personal interests, but not involving public relations, propaganda, lobbying, or political or other non-legal activities (R. 4-5); that their activities are covered by the "trade or commerce" exception in Section 3(d) (R. 6); that the Attorney General "demanded [and has continued to demand] that the plaintiffs individually and as a law firm" register under the Act (R. 5); that registration would require public disclosure by themselves, their employees, and associate counsel they might retain in connection with litigation not only of their relations with the Cuban Government but also of numerous private, personal and business affairs unconnected with such representation (R. 5-6); and that such disclosure could result in a serious invasion of their privacy and hamper

them in employing other lawyers (R. 6). The complaint stated (R. 6) that petitioners have no administrative remedy and no adequate remedy at law; that "they are faced with the dilemma of either registering, although not legally required to do so, or incurring indictment, prosecution and possibly even conviction, for refusing to register"; and that "[i]ndictment and prosecution, even without more, will seriously damage [petitioners'] reputation and interfere with their practice of law and their ability to employ and retain associate counsel."

The Attorney General's answer admitted that he had demanded that petitioners register, but denied (1) that registration would require petitioners, their employees or associate counsel publicly to disclose personal and private affairs unconnected with their representation of the Republic of Cuba, and (2) that Section 3(d) excepts petitioners from registration (R. 22-23). He stated that he did not have sufficient information to form a belief as to the truth of the other allegations in the complaint (R. 23). He admitted that the Act does not provide an administrative remedy, but stated that there is an adequate remedy at law (*ibid.*).

The Attorney General then moved for judgment on the pleadings (R. 24). The district court denied the motion, but the court of appeals, in an appeal under the Interlocutory Appeals Act, reversed. In an opinion by Judge Wright (Judge Fahy dissenting), the court held that the suit was "[i]n effect * * * an effort to restrain the Attorney General from prose-

cuting [petitioners] under the Act"; and that "since [petitioners] have failed to challenge the constitutionality of the Act, on its face or as applied, or the authority of the Attorney General to enforce it, this case should be dismissed on the pleadings as an unconsented suit against the United States" (Pet. 2a, 4a).

ARGUMENT

1. An action brought against a government official with respect to the performance of his official duties is an action against the sovereign—and thus not maintainable unless the government has consented to such suit—if "the judgment sought would * * * interfere with the public administration" (*Land* v. *Dollar*, 330 U.S. 731, 738) or if its effect would be "to restrain the Government from acting * * *" (*Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704). *Dugan* v. *Rank*, 372 U.S. 609, 620. If the petitioners ultimately were to prevail in this action—*i.e.*, if it were held that they are not required to register under the Foreign Agents Registration Act—such a ruling would bar their future prosecution for non-registration. The present action for a declaratory judgment therefore is, as the court of appeals stated (Pet. 2a), "[i]n effect * * * an effort to restrain the Attorney General from prosecuting [petitioners] under the Act." As such, it was properly dismissed as an unconsented suit against the United States.

Where a suit against an officer seeks "not * * * damages but * * * specific relief: *i.e.*, * * * injunction * * * restraining the defendant officer's actions.

* * * the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained." *Larson*, *supra*, 337 U.S. at 688. The Foreign Agents Registration Act is enforceable solely by criminal proceedings. The plain purpose of the present suit is, and its obvious effect if successful would be, to prevent the Attorney General from instituting criminal proceedings under the Act against petitioners. Such an attempt to control the law-enforcement activities of the Attorney General is nothing more or less than an attempt to restrain the sovereign from acting in one of the most vital areas of governmental responsibility—the enforcement of its criminal laws.

The rule that a suit against a government official which seeks "relief against the sovereign" (*Larson*, *supra*, pp. 687, 689) is a suit against the sovereign is not limited, as petitioners suggest (Pet. 13), to cases which involve property in the hands of a government official. The controlling consideration is not the subject matter of the suit, but the effect which granting the relief sought would have upon the sovereign. Where, as here, the relief sought would operate against the sovereign, suits against government officials have frequently been held to be suits against the United States, even though property was not involved.[2]

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[2] See, for example, *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (setting tariff rates); *Rogers* v. *Skinner*, 201 F. 2d 521, 524

Nor is the governing principle any different because the present case is an action for declaratory relief rather than a direct attempt to enjoin the Attorney General from enforcing the Act against petitioners. The Federal Declaratory Judgment Act merely provided a new remedy, but did not expand the jurisdiction of the district courts,[3] and the doctrine of sovereign immunity is fully applicable to suits under it. Cf. *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894.

The present case does not come within either of the two recognized exceptions to the doctrine of sovereign immunity, *i.e.*, a suit against an officer is not one against the sovereign if the officer's action is "[1] not within the officer's statutory powers, or * * * [2] their exercise in the particular case, are constitutionally void." *Larson*, *supra*, 337 U.S. at 702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Dugan* v. *Rank*, 372 U.S. 609, 621-622. Petitioners make no claim that either the Foreign Agents Registration Act or its application to them is unconstitutional. They do contend

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(C.A. 5) (official action of Regional Director of Wage-Hour Division); *Codray* v. *Brownell*, 207 F. 2d 610, 615 (C.A. D.C.), certiorari denied, 347 U.S. 903 (suit to "unblock" property "frozen" under the trading with the Enemy Act); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 ("off-limits" order of commander of military base); *Harper* v. *Jones*, 195 F. 2d 705 (C.A. 10).

[3] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671; *Alabama Federation* v. *McAdory*, 325 U.S. 450, 461-462; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324, 325.

(Pet. 18) that Section 3(d) of the Act excepts their activities from the registration requirements, and that the Attorney General's "demand that they register exceeded his statutory authority." While this argument is framed in terms of the Attorney General's authority, it is actually only a claim that he erred in concluding, on the facts of this particular case, that the Act applies to petitioners. The Attorney General concededly has the authority to decide whether the statute covers petitioners' activities, and whether to institute a criminal proceeding if petitioners refuse to register. "His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction [of the Act as applying to petitioners] was wrong * * *" (*Larson*, *supra*, 337 U.S. at 703).

2. The judgment of the court of appeals directing dismissal of the complaint is sustainable on the alternative ground, not reached by that court, that equity ordinarily will refuse to enjoin a criminal prosecution. A declaratory judgment is a form of equitable relief,[4] and the court of appeals correctly treated the present suit as "an effort to restrain the Attorney General from prosecuting [petitioners] under the Act" (Pet. 2a). See *supra*, pp. 5-6. "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its

[4] *Eccles* v. *Peoples Bank of Lakewood, Calif.*, 333 U.S. 426, 431; *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 240; see also, *Glidden Company* v. *Zdanok*, 370 U.S. 530, 572.

imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

Shields v. *Utah Idaho R. Co.*, 305 U.S. 177, upon which petitioners rely heavily (Pet. 9-10), does not support the jurisdiction of the district court to entertain this action. *Shields* involved a question under the Railway Labor Act, which applies to railroads other than electric interurban ones; the Act directs the Interstate Commerce Commission, upon the request of the Mediation Board, to determine whether a particular line is within the exception. The Commission, upon the request of the Mediation Board, held after hearing that the Utah railroad was not an interurban electric railway. The Mediation Board ordered the railroad to post certain notices required by the Act; failure to do so subjected the carrier to criminal penalties. The railroad then brought an action against the United States Attorney to restrain him from criminally prosecuting it for violation of the Act, contending that it was in fact an interurban railroad. The government did not challenge the propriety of the railroad's invoking equity jurisdiction to restrain the prosecution. 305 U.S. at 183. This Court, holding that the Commission's determination was binding on both the carrier and the Mediation Board (305 U.S. at 182) and noting that it was not otherwise subject to judicial review (*id.* at

183), ruled that the carrier "was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (*id.* at 184).

In the *Shields* case a suit to enjoin the criminal prosecution was maintainable because it was the only means by which the railroad could test the validity of the Commission's determination. The determination was not directly judicially reviewable, and it would have been binding in any criminal action brought against the carrier for non-compliance with the Railway Labor Act. In the present case, however, petitioners may fully litigate the question whether the Foreign Agents Registration Act applies to their activities in any criminal proceeding which may be brought against them if they fail to register. They are, therefore, in no different position than any other person who believes that his conduct is not subject to a particular criminal statute but who runs the risk that, if a court holds otherwise, he may be punished for his violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1963.

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